

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL BURNHART,

Plaintiff,

v.

ELDON VAIL and DEPARTMENT OF
CORRECTIONS,

Defendants.

No. C11-5172 BHS/KLS

ORDER TO AMEND OR SHOW CAUSE

This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Before the Court for review is Plaintiff's civil rights complaint. The court declines to serve the complaint as it is deficient.

DISCUSSION

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998). A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). A complaint or portion thereof, will be

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1 dismissed for failure to state a claim upon which relief may be granted if it appears the “[f]actual
2 allegations . . . [fail to] raise a right to relief above the speculative level, on the assumption that
3 all the allegations in the complaint are true.” *See Bell Atlantic, Corp. v. Twombly*, 127 S.Ct.
4 1955, 1965 (2007)(citations omitted). In other words, failure to present enough facts to state a
5 claim for relief that is plausible on the face of the complaint will subject that complaint to
6 dismissal. *Id.* at 1974.

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8 To state a claim under 42 U.S.C. § 1983, a complaint must allege: (i) the conduct
9 complained of was committed by a person acting under color of state law and (ii) the conduct
10 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the
11 United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 687 L.Ed.2d 420 (1981),
12 *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the
13 appropriate avenue to remedy an alleged wrong only if both of these elements are present.
14 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985). Plaintiff must also allege facts
15 showing how individually named defendants caused or personally participated in causing the
16 harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A
17 defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of supervisory
18 responsibility or position. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694
19 n.58 (1978). A theory of *respondeat superior* is not sufficient to state a section 1983 claim.
20 *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982).

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23 In his complaint, Plaintiff purports to sue Eldon Vail and the Washington Department of
24 Corrections (DOC). His complaint is set forth in the form of the following question:

25 Does D.O.C. have the authority to hold a prior judgment and sentence that has
26 been maxed out as of July 4th 2008 and has conditions against and (illegible) who

1 is in on unrelated charges thereby denying his advantages earned for good
2 behavior.

3 ECF No. 6, p. 4. Plaintiffs asks the court to “intercede and stop D.O.C. from doing this to me
4 and other inmates.” *Id.*

5 Although he names Eldon Vail as a defendant, Plaintiff has set forth no facts to show that
6 Eldon Vail caused or personally participated in causing the harm alleged. In addition, the
7 Eleventh Amendment reads in relevant part:

8 The Judicial power of the United States shall not be construed to extend to any
9 suit in law or equity, commenced or prosecuted against one of the United States
10 by Citizens of another State, or by Citizens or Subjects of any Foreign State.

11 U.S. Const. Amend XI. Under the Eleventh Amendment, therefore, a state is not subject to suit
12 by its own citizens in federal court. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). A state
13 agency, as an arm of the state, is immune from suit in federal court under the Eleventh
14 Amendment as well. *Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Will v. Michigan Dep’t of State*
15 *Police*, 491 U.S. 58, 70 (1989). An entity that has Eleventh Amendment immunity, furthermore,
16 is not a “person” within the meaning of 42 U.S.C. § 1983. *Howlett*, 496 U.S. at 365. As a state
17 agency, the DOC is immune from liability here.

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19 Plaintiff alleges that he is being kept in prison by the DOC for longer than his sentence,
20 claiming that his sentence was “maxed out as of July 4, 2008” and that he is being denied
21 “advantages earned for good behavior.” A writ for *habeus corpus*, however, “is the exclusive
22 remedy for a state prisoner who challenges the fact or duration of his confinement and seeks
23 immediate or speedier release.” *Heck v. Humphrey*, 512 U.S. 477, 481 (1994); *Neal v. Shimoda*,
24 131 F.3d 818, 824 (9th Cir. 1997). This is true even though a section 1983 claim is based on
25 “the alleged unconstitutionality of state administrative action.” *Preiser v. Rodriguez*, 411 U.S.
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1 475, 489 (1973). The Supreme Court has made applicable its holding in *Heck* to the loss of
2 good time credits. *Edwards v. Balistok*, 520 U.S. 641, 643, 646 (1997) (*quoting Heck*, 512 U.S.
3 at 487) (finding challenge to validity of procedures used to deprive prisoner of his good-time
4 credits not cognizable under § 1983, because it necessarily implied invalidity of deprivation of
5 his good-time credits); see also *Muhammad v. Close*, 540 U.S. 749, 751 (2004) (noting *Heck*
6 applies in circumstances where administrative action taken against prisoner could affect credits
7 toward release based on good time served). Thus, it is only in those cases where a prisoner's
8 challenge to, for example, the loss of good time credits "threatens no consequence for his
9 conviction or the duration of his sentence," that the requirements of *Heck* do not apply.
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11 *Muhammad*, 540 U.S. at 751.

12 As noted above, Plaintiff alleges that he is being kept in prison by the DOC for longer
13 than his sentence. He does not claim, nor does he show, that his conviction or sentence already
14 has been invalidated by either court or executive order. In addition, any judgment in favor of
15 plaintiff necessarily would imply the invalidity of his sentence, as the logical consequence of
16 such a judgment would be his release from prison. Accordingly, Plaintiff's claim may be
17 considered only in a petition for writ of *habeas corpus* and should be dismissed with prejudice as
18 frivolous on this basis alone.
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20 Due to the deficiencies described above, the Court will not serve the complaint. Plaintiff
21 may file an amended complaint curing, if possible, the above noted deficiencies, or show cause
22 explaining why this matter should not be dismissed no later than **April 29, 2011**. If Plaintiff
23 chooses to file an amended complaint, which seeks relief cognizable under 42 U.S.C. § 1983, his
24 amended complaint shall consist of a short and plain statement showing that he is entitled to
25 relief, and he must allege with specificity the following:
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- 1) the names of the persons who caused or personally participated in causing the alleged deprivation of his constitutional rights;
- 2) the dates on which the conduct of each defendant allegedly took place; and
- 3) the specific conduct or action Plaintiff alleges is unconstitutional.

Plaintiff shall set forth his factual allegations in separately numbered paragraphs. The amended complaint shall operate as a complete substitute for (rather than a mere supplement to) the present complaint. Plaintiff shall present his complaint on the form provided by the Court. The amended complaint must be legibly rewritten or retyped in its entirety, it should be an original and not a copy, it may not incorporate any part of the original complaint by reference, and it must be clearly labeled the "Amended Complaint" and must include the same case number as this case. Additionally, Plaintiff must submit a copy of the "Amended Complaint" for service on each named Defendant.

If Plaintiff decides to file an amended civil rights complaint in this action, he is cautioned that if the amended complaint is not timely filed or if he fails to adequately address the issues raised herein on or before **April 29, 2011**, the Court will recommend dismissal of this action as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a "strike" under 28 U.S.C. § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who brings three or more civil actions or appeals which are dismissed on grounds they are legally frivolous, malicious, or fail to state a claim, will be precluded from bringing any other civil action or appeal in forma pauperis "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

1 The Clerk is directed to send Plaintiff the appropriate forms so that he may file an
2 amended complaint. The Clerk is further directed to send a copy of this Order and a copy of the
3 General Order to Plaintiff.
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5 DATED this 30th day of March, 2011.

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7 Karen L. Strombom
8 United States Magistrate Judge
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